

#### **IV. SPECTRUM WAS NOT IMPROPERLY INVOLVED IN THE APPLICANTS' COMPETITIVE BIDDING AND VENDOR SELECTION PROCESS**

The basis for the denials was the SLD's conclusion that "vendor was improperly involved in the competitive bidding and vendor selection process." The only evidence for this conclusion was SLD's factual determination that there existed (1) "similarities in Internal Connections descriptions on Forms 470 ... among applicants associated with this vendor" and (2) "similarities in description ... of the vendor selection process among applicants associated with this vendor." The errors in the Denials and the Further Explanations require that they be immediately reversed.

*First*, even assuming that "similarities" exist among the Applicants' Form 470 internal connection descriptions and Selective Review responses, those similarities do not support SLD's conclusion that Spectrum was "improperly involved" in any Applicant's competitive bidding and vendor selection process. Vendor involvement throughout the E-Rate funding process is both permitted and encouraged, and, until May 13, 2003, there was no prohibition on the types of vendor involvement SLD now deems "improper."

*Second*, the SLD's conclusions about the Applicants' Forms 470 are premised on mistaken factual determinations. The Form 470 process is not part of the competitive bidding and vendor selection process, the Applicants' Forms 470 are not similar, and in any event descriptions of the services an applicant seeks to purchase are precisely the "neutral, advisory role [of] ... provid[ing] basic information about the E-Rate Program and the application process" expressly permitted by SLD.

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Further Explanation differs in that it does not refer to the description of the internal connection services on Forms 470. *See* Inglewood District Ex. 2 at 2-3.

*Third*, Spectrum was not involved in the Applicants' actual competitive bidding and vendor selection process. *Descriptions* of the vendor selection process in the Applicants' Information Request responses – provided long after the competitive bidding and vendor selection process ended – cannot support a conclusion that Spectrum was “improperly involved” *during* that process.

*Fourth*, SLD's determination that “[i]t is inappropriate for a service provider to answer questions regarding the competitive bidding process [or] vendor selection” announces a new policy of which the Parties had no prior notice (and, indeed, contradicts explicit prior SLD guidance) and which, as applied retroactively to the Applicants, is unlawful.

*Fifth*, the conclusion that each Applicant did not “prepare” one of its Information Request responses because that response included information it received from Spectrum, is incorrect. Spectrum did not prepare the Information Request responses.

*Finally*, information provided by the Applicants, including their Information Request responses, demonstrates that each Applicant, as required by and in accordance with Commission rules and precedent, carefully considered all bids submitted, conducted fair and open competitive bidding, and did not surrender control of the competitive bidding or vendor selection process.

**A. There Is No Prohibition on the Types of Vendor Involvement SLD Now Deems Improper**

Even assuming that similarities exist among the Applicants' Form 470 internal connection descriptions and Information Request responses, those similarities do not support SLD's conclusion that Spectrum was “improperly involved” in any Applicant's competitive bidding and vendor selection process. Neither the Commission nor SLD prohibits “vendor involvement” at any stage of the E-Rate funding process. In fact, from the very inception of the

E-Rate Program, service providers have been encouraged to participate in all aspects of the program. As a result, the E-Rate Program has evolved into a highly collaborative process combining the efforts of USAC, SLD, applicant schools and libraries, telecommunications, internal connections, and Internet services providers, state officials, consultants, and others. As summarized below, information made available by USAC and SLD about each stage of the E-Rate funding process contains no prohibition on the type of "vendor involvement" SLD now deems improper.

1. The Form 470 Process

Resources for applicants include FCC Form 470 and the SLD web site. The Form 470 Instructions inform applicants that Form 470 "MUST be completed by the entity that will negotiate with potential service providers,"<sup>18</sup> "cannot be completed by a service provider who will participate in the competitive bidding process as a bidder,"<sup>19</sup> and must be signed by the person authorized to order the requested services on behalf of the applicant.<sup>20</sup>

With respect to internal connections descriptions in Form 470 Block 2, the Form 470 Instructions refer applicants to the Eligible Services List on the SLD web site<sup>21</sup> and the SLD Client Services Bureau, and state "[t]he specific data requested [is] sought to provide potential

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<sup>18</sup> FCC Form 470 Instructions at 2. A copy of FCC Form 470 is included as Attachment 1.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* The Commission has held that a service provider who will participate in the competitive bidding process may not act, or be identified, as a contact person for a applicant on the Form 470, nor may it sign the Form 470. See *Mastermind Internet Services, Inc.*, 16 FCC Rcd 4028 (2000), ¶9 ("to the extent a Mastermind [the service provider] employee was listed as the contact person on the FCC Form 470 that initiated a competitive bidding process in which Mastermind participated, such Forms 470 were defective and violated our competitive bidding requirements.").

<sup>21</sup> <<http://www.sl.universalservice.org/reference/eligible.asp>>.

service providers with information so that they may contact you if necessary for detailed information on your specific requirements.”<sup>22</sup>

A more extensive discussion of the acceptable scope of vendor assistance and involvement than is found on Form 470, the SLD web site for applicants, or in the Commission’s rules, is set forth in “The SLD Guide to Service Provider Participation in the E-Rate” (the “Service Provider Guide”), located on the “Service Provider” page on the SLD web site.<sup>23</sup> Section 5 of the Service Provider Guide, “Service Provider Role in Assisting Customers,” makes clear that service provider involvement in an applicant’s efforts to obtain E-Rate funds is not inconsistent with the Program’s “fundamental principle” of fair and open competitive bidding.<sup>24</sup> SLD permits and encourages service providers and applicants to cooperate throughout the funding process. Thus, service providers may “assist[] in [the] Form 470 process,” including but not limited to “acting in a neutral, advisory role, to provide basic information about the E-Rate Program and the application process.”<sup>25</sup> Service providers may “assist in Request for Proposal (RFP) development,” “even if the service provider plans to submit a bid in response to that RFP....”<sup>26</sup> Service providers may “offer technical assistance on the development of a technical plan....”<sup>27</sup> All of this assistance, to the extent offered and provided, occurs before an applicant begins the competitive bidding process by filing Form 470.

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<sup>22</sup> Form 470 Instructions at 10.

<sup>23</sup> The web site is located at <<http://www.sl.universalservice.org/vendor/manual>>. A complete copy of the Service Provider Guide is included as Attachment 2.

<sup>24</sup> Service Provider Guide, § 5 at 1.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

## 2. The Competitive Bidding and Vendor Selection Process

"The purpose of the FCC Form 470 is to open a competitive bidding process for the services desired."<sup>28</sup> The Commission's rules, the SLD web-site, and the Service Provider Guide contain little specific guidance about what communications between applicants and service providers may occur during the competitive bidding process – that is, the period between SLD's posting of an applicant's Form 470 and that applicant's selection of a service provider. Once an applicant's Form 470 is posted, it must be ready to accept bids from service providers, and then must consider all bids it receives before selecting a service provider or signing a contract with a service provider, and may not delegate that evaluation to a service provider.<sup>29</sup> The SLD web site includes a "Reference Area" with a brief section titled "Selecting Service Providers," which states, under the heading "What is the bidding process?", "Once you file your Form 470, it is posted to the SLD web site and competitive bidding can begin. The competitive bidding process requires a 28-day period during which service providers (vendors) may bid on the services you have requested on your Form 470.... You are required to wait 28 days after the posting of your Form 470 before you sign a contract or enter into an agreement for services."<sup>30</sup>

The Service Provider Guide states that "the applicant should not have a relationship with the Service Provider prior to the competitive bidding that would unfairly influence the outcome of a competition nor would furnish the Service Provider with 'inside' information or allow them

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<sup>28</sup> FCC Form 470 Instructions at 2. *See also* SLD web site, "Applicants Page," <http://www.sl.universalservice.org/apply> at 2 ("The FCC Form 470 opens a competitive process for the services desired.").

<sup>29</sup> 47 C.F.R. § 54.504(b)(4).

<sup>30</sup> <http://www.sl.universalservice.org/reference/selectingsp>.

to unfairly compete in any way.”<sup>31</sup> An applicant may not reveal information to a service provider that the applicant does not share with all prospective bidders, and the competitive bidding process may not be conducted in such a way that only a particular service provider could win the bid.<sup>32</sup> “[C]oercion or pressure to use a specific Service Provider” and “interfer[ence] with competitive bidding” are expressly prohibited.<sup>33</sup>

### 3. Post-Vendor Selection

Vendor involvement continues after an applicant selects a vendor and enters into a contract. For example, during an applicant’s preparation of Form 471, which is the formal request for funding, “[t]he chosen Service Provider is expected to be a resource to the applicant for information about the technology, the products and the services that are being furnished to the applicant. The Service Provider should provide information that the applicant can include with their [Form 471] application, as the supporting documentation which describes in detail the services being ordered.”<sup>34</sup> Furthermore, “[t]his role [*i.e.*, serving as “a resource to the applicant

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<sup>31</sup> Service Provider Guide, § 5 at 1. Neither the SLD nor the FCC has stated that an applicant and a service provider may not have any relationship prior to the Form 470 process for a particular funding year; presumably, no such prohibition exists because the Commission always has recognized that applicants in the normal course of business frequently have continuing or long-standing relationships with numerous vendors, including the local telephone company, which may have no competition for E-Rate funded services. See *Mastermind* at n.35 (“Even if an incumbent service provider might have a competitive advantage in a bidding process, it does not exert control over the bidding process to the disadvantage of other potential bidders.”). The Commission could have, but did not, require applicants to contract each Funding Year exclusively with vendors with whom the applicant had no prior relationship in any prior Funding Year.

<sup>32</sup> Service Provider Guide, § 5 at 2.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*, § 5 at 3.

for information about the technology, the products and the services that are being furnished to the applicant”] may not end with the funding Commitment Decision Letter.”<sup>35</sup>

4. Program Integrity Assurance and Selective Review Information Request

The Service Provider Guide defines Program Integrity Assurance (“PIA”) as “part of the NECA function; review applications and invoices for compliance with program rules,”<sup>36</sup> and states:

Program Integrity Assurance Contacts:

Application Review – Application review is conducted by Program Integrity Assurance staff who are contractors located in New Jersey. They review the Form 471 and supporting documentation.... It is possible that PIA staff may reach out to the applicant, the Service Provider or both in an effort to clarify information contained in the application or supporting documentation.

PIA operates on a limited timeframe to resolve issues with applications. PIA may impose restrictions on when information can be returned to PIA. Please help your applicants comply with those deadlines, where possible.<sup>37</sup>

The Service Provider Guide also states that “[b]oth the applicant and the Service Provider can be resources to Program Integrity Assurance (PIA) staff during application review, whether that occurs prior to the original funding commitment or at a later stage due to a change in circumstances.”<sup>38</sup>

Neither the SLD’s Applicant web page, the Service Provider Guide, nor the Commission’s rules contain any reference to the Selective Review Information Request (“Information Request”) process, which is a part of the PIA function. On May 13, 2003 – three

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<sup>35</sup>

*Id.*

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*Id.*, § 2 at 2.

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*Id.*, § 6 at 2 (“SLD Communications Regarding Applications”).

weeks after the Denials – SLD posted to the “What’s New!” page of its web site an announcement titled “Service Providers Cannot Respond to Selective Review Requests” (the “Selective Review Announcement”).<sup>39</sup> The Selective Review Announcement states, in relevant part:

The SLD selects some applicants for a Selective Review to ensure that they are following certain FCC rules.... Applicants who are chosen for Selective Reviews are sent the E-Rate Selective Review Information Request.

As part of this request, applicants are asked to answer certain questions and provide documentation regarding their competitive bidding and vendor selection process....

The person authorized by the applicant to sign on the applicant’s behalf, or the entity’s authorized representative, is required to certify that the authorized signer prepared the responses to the Selective Review Information Request on behalf of the entity.

The SLD has become aware that, in some cases, service providers have provided the answers to the Selective Review Information Request. The SLD allows service providers to serve as the contact person on FCC Forms 471 because the service provider is often in the best position to answer the SLD’s questions regarding the services for which funding has been sought on the Form 471. However, it is not appropriate for service providers to provide the answers to the Selective Review Information request. In particular, the service provider selected by the applicant must not answer questions regarding the competitive bidding process, vendor selection, and the applicants’ ability to pay their share of the cost. The applicant or its authorized consultant (which cannot be the applicant’s service provider) is responsible for answering these questions. To emphasize this responsibility, the SLD requires applicants to certify that they have provided the answers to the Selective Review Information Request.

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*Id.*, § 5 at 3.

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<<http://www.sl.universalservice.org>>, “What’s New!”. A copy of the announcement is included as Attachment 3. The web site contains a link to the Information Request, which apparently is the first public availability of that form (a copy of which is included as Attachment 4).

The SLD has denied and will continue to deny funding requests where there is evidence that the service provider, rather than the applicant or its authorized representative, provided the answers to these questions.<sup>40</sup>

The E-Rate Selective Review Information Request Instructions and Worksheet (the "Information Request Worksheet"), which is the form referred to in the Selective Review Announcement, states "[t]his fax requests information that must be provided by the applicant, or by the applicant's authorized representative."<sup>41</sup> The Information Request Worksheets received by the Applicants in 2002 contained no specific prohibition on service provider assistance.

As shown below, SLD found no violation of any rule or policy in effect at the time the Applicants filed their applications and submitted their responses to the PIA staff's Information Requests.

**B. SLD's Conclusions Regarding the Applicants' Forms 470 Are Premised on Mistaken Factual Determinations**

The SLD's conclusion that "similarities" among the Applicants' Forms 470 internal connection descriptions "indicate" improper vendor involvement in the competitive bidding process, is premised on two mistakes of fact. First, the posting of Form 470 begins the competitive bidding process. Vendor assistance in preparing Form 470 (which is not prohibited) occurs prior to posting and thus by definition is not part of the competitive bidding process. Second, the Applicants' Forms 470 are not similar.

As noted above, Form 470 clearly states that the competitive bidding and vendor selection process begin when an applicant's Form 470 is posted. There is no "competitive bidding process" prior to posting. Consequently, "similarities" in the descriptions of services on

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*Id.*

which the applicants will seek bids cannot be the basis for concluding that a vendor who bid on those services was improperly involved in the bidding process.

Neither the Decisions nor the Further Explanations explained what “striking similarities”<sup>42</sup> in internal connection description the SLD observed, and a review of the Applicants’ Forms 470 reveals no such similarities. Form 470 asks if the applicant has a Request for Proposal (“RFP”) that specifies the services it is seeking. If the applicant answers “no,” Block 2, Item 10 (“Summary Description of Needs or Services Requested”) further requires the applicant to “list below the Internal Connections Services you seek. Specify each service or function (e.g., local area network) and quantity and/or capacity (e.g., connecting 10 rooms and 300 computers at 56Kbps or better).” Each Applicant answered “no” regarding an RFP, and thus listed the internal connection services on which it sought bids.<sup>43</sup> The El Monte District listed 95 separate services or functions, for each of 8 sites.<sup>44</sup> The Hemet District listed five separate services or functions, with a different quantity or capacity specified for each.<sup>45</sup> The Lucerne District listed 108 separate services or functions, with the quantity or capacity to be specific by school district.<sup>46</sup> The Romoland District listed six separate services or functions, with a different

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*(Footnote continued from previous page)*  
Information Request at 1.

<sup>42</sup> See, e.g., El Monte District Ex. 2, p. 2.

<sup>43</sup> Copies of the Applicants’ Forms 470 are attached as El Monte District Exhibit 3, Hemet District Exhibit 3, Lucerne District Exhibit 3, Romoland District Exhibit 3, and Rosemead District Exhibit 3, respectively.

<sup>44</sup> El Monte District Ex. 3 at 4-6.

<sup>45</sup> Hemet District Ex. 3 at 3-4.

<sup>46</sup> Lucerne District Ex. 3 at 4-6.

quantity or capacity specified for each.<sup>47</sup> The Rosemead District listed 68 separate services or functions with a Districtwide quantity or capacity specified for each.<sup>48</sup>

There are no apparent “striking similarities” among the Applicants’ “quantity or capacity” responses. To the extent that “similarities” exist among the Applicants’ specified services or functions, it is because each item listed on their Forms 470 is listed in the same or virtually the same manner on the SLD’s Eligible Services List.<sup>49</sup>

In addition to the mistaken factual determinations by SLD, its conclusion that “similarities in Internal Connections description on Forms 470 ... indicate that [Spectrum] was improperly involved in the competitive bidding and vendor selection process” apparently is premised upon a determination – not stated in the Decisions or the Further Explanations – that a service provider may not assist an applicant in preparing Form 470. Such a determination is entirely inconsistent with explicit advice given to applicants and service providers alike by SLD about the reliance applicants may place on service providers to obtain information. Service providers may “act[] in a neutral, advisory role, to provide basic information about the E-Rate Program and the application process.”<sup>50</sup> “Basic information” clearly includes information about eligible services and use of the SLD’s web site to confirm what services are eligible. Spectrum

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<sup>47</sup> Romoland District Ex. 3 at 4-6.

<sup>48</sup> Rosemead District Ex. 3 at 3-4.

<sup>49</sup> Statements made at the Commission’s recent Public Forum on Improving Administration of the E-Rate Program shed light on the operation of the PLA program that may explain the defects in the Decisions and Further Explanations. Greg Weisiger, representing the Council of Chief State School Officers E-Rate Alliance, stated, “USAC hires temporary workers each year. They are trained in an extensive two-week regimen[] and thrown out on the front lines of application review....” Comments of Greg Weisiger at 4. Mr. Weisiger’s comments also suggest that the importance of close involvement with PLA staff and that, based on recent funding request denials, “perhaps we did not spend enough time briefing our [Selective] reviewers this spring.” *Id.*

<sup>50</sup> Service Provider Guide, § 5 at 1.

did not provide any information to the Applicants that is not consistent with this explicit guidance to service providers to provide applicants with accurate information about the E-Rate Program and to refer applicants to the SLD's web site and guidelines. Indeed, Spectrum believes it has an obligation to do exactly that. Notably, in the Denials and Further Explanations, SLD did not cite a single instance in which any Applicant or Spectrum acted contrary to any Commission or SLD rule or guideline.<sup>51</sup>

Simply put, descriptions of services on which bids are requested – whether similar or not – would be relevant to the question of whether an applicant conducted fair and open bidding only if those descriptions were prepared in a manner that favored a particular service provider. The SLD reached no such conclusion here. The Applicants' Forms 470 gave all potential bidders the same information about the services and products on which the Applicants wished to receive bids.

In any event, Spectrum's involvement in the Applicants' Form 470 process was limited and neutral. As noted above, Spectrum, under the auspices of the California Department of Education, conducts E-Rate training workshops for schools and libraries. Training is required to be conducted on a neutral basis, and includes assisting potential applicants in identifying eligible services – a role specifically endorsed by SLD.<sup>52</sup> At least one Applicant (El Monte District) attended such a workshop.<sup>53</sup> Another Applicant, Lucerne District, was part of a consortium of

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<sup>51</sup> As noted above, a service provider is permitted to assist applicants in developing an RFP even if the vendor will submit a bid (Service Provider Guide, § 5 at 1); such assistance necessarily must include assistance in determining which services are eligible for E-Rate funding for purposes of identifying such services on Form 470. Consequently, it would be inconsistent for the SLD to allow vendor involvement with an RFP but prohibit involvement with Form 470 service selection.

<sup>52</sup> Service Provider Guide, § 5 at 1.

<sup>53</sup> See El Monte District Declaration at 2.

school districts and advised the consortium's representative to apply for all eligible services.<sup>54</sup> Applicants El Monte District, Hemet District, Lucerne District, and Romoland District each has affirmed that it (or, in the case of Lucerne District, the representative of the consortium of which it was a member) was responsible for the selection of internal connections services listed in its Form 470 and that Spectrum was not improperly involved in that process.<sup>55</sup>

**C. Spectrum Was Not Improperly Involved in Any Applicant's Competitive Bidding and Vendor Selection Process**

As noted, Form 470 clearly states that "[t]he purpose of the FCC Form 470 is to open a competitive bidding process,"<sup>56</sup> which ends when the applicant reaches an agreement or signs a contract with a service provider. In the Decisions and Further Explanations, SLD stated that "similarities" in "description[s] ... of the vendor selection process" provided in response to Information Requests "indicate" improper vendor involvement by Spectrum in the competitive bidding and vendor selection process.<sup>57</sup> As with the purported similarities in internal connection descriptions in the Applicants' Forms 470, however, the descriptions cited by SLD had no bearing on the competitive bidding and vendor selection process.

No "competitive bidding and vendor selection process" exists prior to posting Form 470, or after a vendor is selected and a contract is signed. The Information Request responses were prepared and submitted long after the competitive bidding ended and Spectrum was selected; those responses were not part of the competitive bidding and vendor selection process.

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<sup>54</sup> See Lucerne District Declaration at 2.

<sup>55</sup> El Monte District Declaration at 2; Hemet District Declaration at 2; Lucerne District Declaration at 2; Romoland District Declaration at 2.

<sup>56</sup> FCC Form 470 Instructions at 1.

<sup>57</sup> See, e.g., Hemet District Ex. 1; Inglewood District Ex. 2 at 2.

Consequently, *descriptions* of the vendor selection process provided by the Applicants – long after the competitive bidding and vendor selection process ended – cannot, as a matter of fact, law, or logic, support the SLD’s speculative conclusion that Spectrum was “improperly involved” *during* that process.

As even SLD concedes, the “descriptions” it refers to in the Further Explanations can, at most, lead only to an inference or “indicat[ion]” of improper involvement, and cannot, standing alone, prove such involvement. Here, however, the descriptions do stand alone. In the Denials and Further Explanations, SLD did not cite a single instance in which the Applicants or Spectrum acted contrary to any Commission or SLD rule during the competitive bidding and vendor selection process. The only “vendor involvement” referred to by SLD occurred before and after the competitive bidding and vendor selection process. SLD did not cite any action by Spectrum that “unfairly influenced the outcome” of the process or that “interfere[d] with competitive bidding,” and each Applicant has submitted information confirming that Spectrum did not do so.<sup>58</sup>

The “description” of the vendor selection process cited in the Decisions and the Further Explanations was Item 4 of the Information Request Worksheet, which states:

Please provide complete documentation indicating how and why you selected the service provider(s) selected. This documentation should include a description of your evaluation process and the factors you used to determine the winning contract(s).<sup>59</sup>

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El Monte District Declaration at 3; Hemet District Declaration at 2; Inglewood District Beckwith Declaration at 4; Lucerne District Declaration at 2-3; Romoland District Declaration at 2. See also Rosemead District Ex. 5, Letter from Dr. Lila Wills Bronson, Director of Technology, Rosemead School District, to Michael Deusinger, USAC, February 10, 2003 (providing detailed description of Rosemead District’s competitive bidding and vendor selection process, including steps taken to resolve problems with another vendor experience for Funding Year 4).

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El Monte District Ex. 2 at 2; Hemet District Ex. 2 at 2; Inglewood District Ex. 2 at 2; Lucerne District Ex. 2 at 2; Romoland District Ex. 2 at 3; Rosemead District Ex. 2 at 2.

The Applicants' responses to Item 4 are similar, but not identical.<sup>60</sup> Rosemead District stated additional factors regarding its vendor selection process,<sup>61</sup> and each Applicant's Information Request responses contained other information regarding its vendor selection criteria.<sup>62</sup> Moreover, each Applicant submitted additional information about its competitive bidding and vendor selection process.<sup>63</sup> However, SLD relied solely on the similarities between the responses, and did not consider the substance of the responses, which demonstrated that each Applicant had a valid, if similar, reason for selecting Spectrum.<sup>64</sup>

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Copies of the Applicants' Information Request responses are included as El Monte District Exhibit 4, Hemet District Exhibit 4, Inglewood District Exhibit 4, Lucerne District Exhibit 4, Romoland District Exhibit 4, and Rosemead District Exhibit 4, respectively. The portion of the response that is similar among Applicants states: "Spectrum Communications was selected by [the District] under the CMAS procurement program and other applicable procurement codes. Spectrum Communications provides the most cost-effective product, with the least amount of hassle, and exceeds District requirements for Information Technology projects. Spectrum Communications understands the Business Operations of [the District], due to the many years that this vendor has been successfully utilized for Information Technology Projects. It is allowable under California Public Contract Code 10299 for [the District] to select Spectrum Communications under the CMAS agreement without further competitive bidding." See El Monte District Ex. 4 at 4; Hemet District Ex. 4 at 3; Inglewood District Ex. 4 at 3; Lucerne District Ex. 4 at 2; Romoland District Ex. 4 at 3; Rosemead District Ex. 4 at 4.

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See Rosemead District Ex. 4 at 4 ("Please Note: As Rosemead School District is a member of a 19 District Educational Technology Consortium, we meet monthly to discuss technology planning, ERATE and grant funding proposals, staff development planning, vendor selection criteria, network operations, staffing and other pertinent issues. This forum has been an invaluable resource to me ... to make the appropriate recommendations regarding vendors and other technical matters with respect to ERATE.").

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See El Monte District Ex. 4 at 2-3; Hemet District Ex. 4 at 2-3; Inglewood District Ex. 4 at 2; Lucerne District Ex. 4 at 1-2; Romoland District Ex. 4 at 2-3; Rosemead District Ex. 4 at 2-3.

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See El Monte District Exhibit 5; Hemet District Exhibit 5; Inglewood District Exhibit 5; Lucerne District Exhibit 5; Romoland District Exhibit 5; Rosemead District Exhibit 5.

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It is not clear why SLD focused solely on the Applicants' responses regarding the selection of its internal connections services provider, as there also were substantial similarities in the Applicants' descriptions of their vendor selection process and criteria for telecommunications and Internet services as well. See El Monte District Ex. 4 at 2-4; Hemet District Ex. 4 at 2-3; Inglewood District Ex. 4 at 1-3; Lucerne District Ex. 4 at 1-2; Romoland District Ex. 4 at 2-3; Rosemead District Ex. 4 at 1-4. The SLD's discrimination in the selective review process constitutes unlawful, arbitrary and capricious decisionmaking.

Spectrum did assist the Applicants by providing information used by the Applicants to prepare the response to Item 4.<sup>65</sup> As explained below, however, neither the Applicants nor Spectrum had any knowledge, notice or warning that the assistance Spectrum provided was not permitted or would result in denial of the funding requests, and only after the SLD issued the Decisions did it prohibit such assistance.

**D. The Prohibition on Vendor Assistance in the Selective Review Process Constitutes Unlawful Retroactive Application of New Procedures**

In the Further Explanations, SLD stated that “[i]t is inappropriate for a service provider to answer questions regarding the competitive bidding process [or] vendor selection.” This determination announces a new policy of which no E-Rate Program participant, including the Applicants and Spectrum, had prior notice and which, as applied to the Applicants, constitutes an unlawful retroactive penalty.

Until May 13, 2003, there existed no rules or policies regarding the Information Request process. As noted above, the Service Provider Guide advises that PIA staff “may reach out to the applicant, the Service Provider or both in an effort to clarify information contained in the application or supporting documentation” and then specifically instructs vendors to “help your applicants comply with [PIA] deadlines” for supplying such information.<sup>66</sup> The Service Provider Guide also states that “[b]oth the applicant and the Service Provider can be resources to ... PIA staff during application review.”<sup>67</sup> The Information Request Instructions and Worksheet received

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<sup>65</sup> Spectrum previously acknowledged that it assisted its customers in their Selective Review responses, in particular to clarify applicable state law procurement rules and procedures. See Letter from P. Pendergrass, General Counsel of Spectrum, to Scott A. Barash, General Counsel of SLD, April 7, 2003 (included as Attachment 5).

<sup>66</sup> Service Provider Guide § 6 at 2.

<sup>67</sup> *Id.* § 5 at 3.

by the Applicants do not prohibit such cooperation.<sup>68</sup> Thus, not only did the Applicants and Spectrum have no notice that Spectrum could not assist the Applicants, but such assistance appeared to be expressly permitted. Spectrum offered assistance to the Applicants in good faith and with the intention of fulfilling its obligations, as it understood them, to provide ongoing assistance to its customers.

Only after SLD released the Decisions and the Further Explanations did it announce any limitations on vendor involvement in the PIA and Selective Review process. The Selective Review Announcement, posted on the SLD's Service Provider web page on May 13, apparently was the first public reference to the Selective Review process.<sup>69</sup> The Selective Review Announcement states, "SLD allows service providers to serve as the contact person on FCC Forms 471 because the service provider is often in the best position to answer the SLD's questions regarding the services for which funding has been sought on the Form 471. However, it is not appropriate for service providers to provide the answers to the Selective Review Information request. In particular, the service provider selected by the applicant must not answer questions regarding the competitive bidding process, vendor selection, and the applicants' ability

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*See, e.g., Attachment 4.*

<sup>69</sup>

Limited discussion of Selective Review occurred only recently on the biweekly Service Provider Conference Call held by SLD. SLD posts on its web site the Minutes from each such call, which began in September 2000. At no time did SLD state that vendor assistance is not allowed. During the March 26, 2003, call, one participant asked "Why doesn't the SLD communicate with the applicant and service provider during the review process in order to allow the service provider or applicant to assist in clearing potential problems?" SLD responded that it "do[es] reach out in the vast majority of cases when we need additional information. When we are investigating allegations of abuse, we often can't communicate without compromising the investigation." Minutes from the Wednesday Service Provider Conference Call, March 26, 2003, <<http://www.sl.universalservice.org/vendor/agenda/032603.min>>. During the April 9, 2003 call, a participant asked, with respect to Selective Review, "How does the SP get[] involved in the questions?" SLD responded simply that "[o]n the services side, applicants may seek assistance from the service provider; however, some questions that we ask the applicant, the SP cannot and should not answer." Minutes from the Wednesday Service Provider Conference Call, April 9, 2003, <<http://www.sl.universalservice.org/vendor/agenda/040903.min>>.

to pay their share of the cost.”<sup>70</sup> This language is nearly identical to the April 22, 2003 Further Explanations, and plainly constitutes a new policy; prior to May 13, 2003, no prohibition against such assistance existed in the Commission’s rules, the SLD’s web site, the Service Provider Guide, or any other materials of which the Parties were aware.

The application of this new prohibition to the Applicants attaches new legal consequences to events completed long before its adoption and thus constitutes unlawful retroactive punishment.<sup>71</sup> This ad hoc retroactive change to SLD policies unfairly penalizes students who have clear needs for the benefits of the E-Rate Program, whose districts relied in good faith on existing SLD policies in their selection of service providers. Because the penalty – denial of funding – would work a “manifest injustice,” the Decisions must be reversed.<sup>72</sup>

#### **E. The Applicants Prepared the Information Request Responses**

The Further Explanations state: “The person authorized by the applicant to sign on the applicant’s behalf, or the entity’s authorized representative, is required to certify that the authorized signer prepared the responses to the Selective Review Information Request on behalf

<sup>70</sup>

See Attachment 4. The rationale for this new policy is not stated, and in light of the contradictory request in the Service Provider Manual that service providers “help your applicants” in resolving issues and responding to PLA staff requests, no rationale is apparent. Information regarding an applicant’s vendor selection and contracting processes is, under California law, readily obtainable; moreover, it simply is not logical to infer, as SLD did, that prior events being described (the competitive bid and vendor selection process) “became” tainted by a description of that process provided well after those events occurred.

<sup>71</sup>

See *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994).

<sup>72</sup>

*Verizon Tel. Cos. v. FCC*, 296 F.3d 1098 (D.C. Cir. 2001) (quoting *ClarkCowlitz Joint Operating Agency v. FCC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (*en banc*)). SLD’s application of a retroactive punishment also clearly exceeds authority delegated to USAC. The Commission’s rules prohibit USAC from making policy, interpreting unclear provisions of law, or interpreting Congressional intent, and require USAC to seek guidance from the Commission when the Act or the Commission’s rules are unclear or do not address a particular situation. 47 C.F.R. § 54.702(c). Thus, neither USAC nor SLD possesses authority to apply retroactively the new policy contained in the Selective Review Announcement – or to adopt such a policy in the first instance.

of the entity,”<sup>73</sup> and, further, that “USAC concluded that these responses [*i.e.*, the Applicants’ responses to Item 4 of the Information Request] had been prepared by the service provider and provided to the applicant, and were not prepared by the applicant as required under the Schools and Libraries Support Mechanism.”<sup>74</sup>

The Information Request requires an applicant to certify that “I ... prepared the responses to this fax.” The common definition of “prepare” is “to make ready, usually for a specific purpose”; an alternative meaning is “to put together or make out of ingredients, parts, etc.”<sup>75</sup> Notwithstanding the SLD’s conclusion that the Applicants did not “prepare” their Information Request responses, that is exactly what they did. “Prepare” is not defined as “creating without assistance from any outside source,” as SLD has interpreted it. The signatory for El Monte District, Hemet District, Inglewood District, Lucerne District, and Romoland District instructed others, including Spectrum, to compile information that he or she believed to be responsive to the Information Request, and then reviewed, or had another District staff person review, that information, confirmed its accuracy, instructed others to type out that information, and attested to its accuracy by signing the certification.<sup>76</sup> Spectrum provided information -- in particular, detailed information about state procurement rules and procedures.

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<sup>73</sup> El Monte District Ex. 2 at 2; Hemet District Ex. 2 at 2; Inglewood District Ex. 2 at 2; Lucerne District Ex. 2 at 2; Romoland District Ex. 2 at 2; Rosemead District Ex. 2 at 2 (in each case citing E-Rate Selective Review Information Request, Funding Year 2002 at 15).

<sup>74</sup> El Monte District Ex. 2 at 2-3; Hemet District Ex. 2 at 2-3; Inglewood District Ex. 2 at 2; Lucerne District Ex. 2 at 2-3; Romoland District Ex. 2 at 2-3; Rosemead District Ex. 2 at 2-3.

<sup>75</sup> Webster’s New World Dictionary, Third College Edition.

<sup>76</sup> See El Monte District Declaration at 4; Hemet District Declaration at 4; Inglewood District Declaration at 4; Lucerne District Declaration at 4; Romoland District Declaration at 3-4. Spectrum provided similar assistance to the Rosemead District signatory.

Under the circumstances, it is incontrovertible that each Applicant "prepared" its Information Request responses and that its certification on the Information Request was not false. In the Further Explanations, SLD states that it will not accept an applicant's certification that it prepared its responses if the applicant received vendor assistance in connection with certain questions.<sup>77</sup> As with its new policy against certain types of vendor assistance, this statement announced a new policy that may not be applied retroactively to deny the Applicants' Funding Year 2002 requests.

**F. The Applicants Conducted a Fair and Open Bidding Process and Did Not Surrender Control to Spectrum**

The Further Explanations state that "USAC sought to ensure that you had complied with" the requirement to "carefully consider all bids" "by seeking a description of your competitive bidding process, your vendor evaluation process and the factors you used to determine the winning contract. Based on the evidence described above, USAC reasonably has concluded that the description of this process that you provided to USAC appears to have been prepared by your service provider."<sup>78</sup> The Applicants' responses, however, in no way indicate that any Applicant did not comply with its obligation to carefully consider all bids. Applicants "may consider relevant factors other than the pre-discount prices submitted by providers,"<sup>79</sup> although "price should be the primary factor,"<sup>80</sup> Additional factors that may be considered, where permitted by

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<sup>77</sup> See, e.g., Lucerne District Ex. 2.

<sup>78</sup> El Monte District Ex. 2 at 2; Hemet District Ex. 2 at 2; Inglewood District Ex. 2 at 2; Lucerne District Ex. 2 at 2; Romoland District Ex. 2 at 2; Rosemead District Ex. 2 at 2 (citing 47 C.F.R. § 54.511(a)).

<sup>79</sup> 47 C.F.R. § 54.511(a).

<sup>80</sup> *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 9029 (1997), ¶481, as corrected by *Errata*, FCC 97-157 (rel. June 4, 1997), *aff'd in part, rev'd in part, and remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5<sup>th</sup> Cir. 1999).

state and local procurement laws, include “prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives.”<sup>81</sup> The Applicants’ Information Request and supplemental responses reflect reliance on permitted factors,<sup>82</sup> and SLD did not find deficient any Applicant’s compliance with its obligation to carefully consider all bids, or the factors used in such consideration.<sup>83</sup>

Moreover, in relying solely on “the evidence described above,” SLD ignored other information provided by each Applicant during the Selective Review demonstrating that it conducted a “fair and open” competitive bidding process. For example, SLD requested additional information from each Applicant after the Information Request responses were received, and the Applicants responded by submitting additional detailed information about California state procurement rules and its selection of Spectrum.<sup>84</sup>

Each Applicant has demonstrated that it conducted a fair and open competitive bidding process and did not surrender control to Spectrum.<sup>85</sup> Apart from the “similarities” cited by SLD

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<sup>81</sup>

*Id.*

<sup>82</sup>

See El Monte District Exhibits. 4, 5; Hemet District Exhibits. 4-5; Inglewood District Exhibits. 4-5; Lucerne District Exhibits. 4-5; Romoland District Exhibits 4-5; Rosemead District Exhibits 4-5.

<sup>83</sup>

As the Commission has stated, “[e]ven if an incumbent service provider might have a competitive advantage in a bidding process, it does not exert control over the bidding process to the disadvantage of other potential bidders.” *Mastermind* at n.35.

<sup>84</sup>

See El Monte District Exhibit 5 (September 18, 2002 and January 31, 2003 responses to SLD supplemental information requests; Hemet District Exhibit 5 (January 30, 2003 and February 4, 2003 responses to SLD supplemental information requests); Inglewood District Exhibit 5 (January 31, 2003 and February 3, 2003 responses to SLD supplemental information requests); Lucerne District Exhibit 5 (February 21, 2003 response to SLD supplemental information request); Romoland District Exhibit 5 (January 24, 2003 and January 31, 2003 responses to SLD supplemental information requests); Rosemead District Exhibit 5 (September 25, 2002 and February 10, 2003 responses to SLD supplemental information requests).

<sup>85</sup>

See El Monte District Declaration, Hemet District Declaration, Inglewood District Declaration; Lucerne District Declaration; Romoland District Declaration. See also Rosemead District Exhibits 4, 5.

– which, as shown, to the extent they exist do not constitute a violation of any known rule or policy – SLD cited nothing to indicate “improper involvement,” much less a surrender of control by the Applicants.<sup>86</sup> The Applications thus are readily distinguishable from the cases in which the Commission has affirmed the denial of funding to an applicant that “surrender[ed] control of the bidding process to a service provider that participate[d] in that bidding process.”<sup>87</sup> Spectrum was not listed as a contact on any Applicant's Form 470 or Form 471, did not prepare RFPs and distribute them to potential bidders, and no Applicant delegated authority to Spectrum.<sup>88</sup> Nor did any Applicant fail to disclose information about its competitive bidding process necessary for potential bidders to formulate bids<sup>89</sup> or not comply with other obligations.<sup>90</sup> Under the circumstances presented, there is no basis for denial of the Applicants' Funding Year 2002 requests.

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<sup>86</sup> Prior to the Decisions, it does not appear that SLD ever had denied a funding request based on “improper vendor involvement,” and the adoption and application of such a standard, like SLD's retroactive application of its new policies to the Applicants, exceeds SLD's authority.

<sup>87</sup> *Mastermind* at ¶10.

<sup>88</sup> Compare *Mastermind* at ¶10 (by naming as its contact person an employee of a service provider who not only participated in the bidding process but was awarded a contract, and allowing that service provider to prepare and distribute RFPs to potential bidders, the applicant surrendered control of the bidding process); *A. R. Carethers SDA School, et al.*, 16 FCC Rcd 6943 (Com. Car. Bur. 2001) (applicants identified as contact person on Form 470 a person associated with the service provider); *Dickerson County Public Schools*, 17 FCC Rcd 9410 (Wireline Comp. Bur. 2002) (*same*).

<sup>89</sup> Compare *Ysleta Independent School District, Further Explanation of Administrator's Funding Decision*, December 3, 2002 at 6 (based on the facts, the applicant “could not have selected the most cost effective provider of service, with low cost being the primary factor ... because IBM [the vendor] did not specify the cost of the contract, because Ysleta selected IBM before the actual work for which funding would be requested was defined and quantified, and because the RFP's selection criteria do not include these factors.”).

<sup>90</sup> Compare *id.* at 6 (“Furthermore, Applicant's stated reasons for selecting IBM do not indicate that Applicant selected IBM based on whether IBM was the most cost-effective provider of service with low cost being the primary factor.”).


## V. CONCLUSION

WHEREFORE, the foregoing premises duly considered, the SLD's Decisions denying the Funding Year 2002 requests of the El Monte Unified School District, the Hemet Unified School District, the Inglewood Unified School District, and Lucerne Valley Unified School District, the Romoland Elementary School District, and the Rosemead Elementary School District, should be reversed immediately.

Respectfully submitted,

**EL MONTE UNIFIED HIGH SCHOOL DISTRICT  
HEMET UNIFIED SCHOOL DISTRICT  
INGLEWOOD UNIFIED SCHOOL DISTRICT  
LUCERNE VALLEY UNIFIED SCHOOL DISTRICT  
ROMOLAND ELEMENTARY SCHOOL DISTRICT  
SPECTRUM COMMUNICATIONS CABLING  
SERVICES, INC.**

By:

  
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June 19, 2003

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Requests for Review of the	)	
Decision of the	)	
Universal Service Administrator by	)	
	)	
American Falls School District No. 1381	)	File No. SLD-380611
American Falls, Idaho	)	
	)	
Approach Learning and Assessment Centers	)	File No. SLD-297762
(filed by E-Rate Consulting)	)	
Winston-Salem, North Carolina	)	
	)	
Banning Unified School District	)	File Nos. SLD-295351, 312273
Banning, California	)	
	)	
CRW Consulting, LLC	)	File Nos. SLD-306785, 303203,
Tulsa, Oklahoma	)	307124, 297420, 306762
	)	
El Monte Unified High School District, et al	)	File Nos. SLD-295589, 303357,
El Monte, California	)	305956, 311437, 313520, 314228
	)	
Florence County School District 3	)	File Nos. SLD-224402, 224408,
Chicago, Illinois	)	224412, 224418, 224419, 227486
	)	
Fowler Elementary School District No 45	)	File No. SLD-298897
Arizona	)	
	)	
Grant Joint Union High School District	)	File No. SLD-316355
McClellan, California	)	
	)	
Helena Public School District	)	File No. SLD-329699
Helena, Montana	)	
	)	
Humble Independent School District	)	File No. SLD-380437
Humble, Texas	)	
	)	
International Business Machines Corporation	)	File No. SLD-302305
(filed on behalf of Winton-Salem/Forsyth	)	
County School District)	)	
Winston-Salem, North Carolina	)	
	)	
Integrity Communications on behalf of San Diego	)	File No. SLD-317808
Independent School District	)	
San Diego, Texas	)	
	)	
Iroquois West Community Unit School	)	File No. SLD-343292
District No. 10	)	
Gilman, Illinois	)	
	)	
John A. Coleman Catholic High School	)	Billed Entity No. 13863

Hurley, New York	)	
	)	
Knox County School District	)	File No. SLD-215885
Knoxville, Tennessee	)	
	)	
Lake City Area School District	)	File No. SLD-35738
Michigan	)	
	)	
Lincoln Parish School Board	)	File Nos. SLD-344917, 359293
Ruston, Louisiana	)	373945, 373993, 378343
	)	
Nampa School District No. 13	)	File No. SLD-318599
Nampa, Idaho	)	
	)	
Ohr Haemet Institute	)	File No. SLD-227901
Los Angeles, California	)	
	)	
OneNet	)	File Nos. SLD-139469, 136909
Oklahoma City, Oklahoma	)	149283
	)	
Owensboro Public Schools	)	File No. SLD-241629
Owensboro, Kentucky	)	
	)	
Penn Cambria School District	)	File No. SLD-340427
Cleveland, Ohio	)	
	)	
Rosemead School District	)	File Nos. SLD-303357
Rosemead, California	)	
	)	
School Board of Alachua County	)	File No. SLD-266209
Gainesville, Florida	)	
	)	
School District of Palm Beach County	)	File No. SLD-328065
West Palm Beach, Florida	)	
	)	
Southwest Plains Regional Service Center	)	File Nos. SLD-109071, 107527
Sublette, Kansas	)	75145, 69113
	)	
Starkville School District	)	File Nos. SLD-306276, 305788
Starkville, Mississippi	)	314970
	)	
Sts. Peter and Paul School	)	File No. SLD-372104
Warren, Ohio	)	
	)	
Tamaroa Public School District No. 5	)	File No. SLD-340729
Tamaroa, Illinois	)	
	)	
Virgin Island Department of Education	)	File No. SLD-331593
St. Thomas, Virgin Islands	)	
	)	
Yeshiva Bnos Ahavas Israel	)	File Nos. SLD-222194, 226981
Brooklyn, New York	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 02-6
Universal Service	)	

## ORDER

Adopted: September 26, 2003

Released: September 29, 2003

By the Telecommunications Access Policy Division, Wireline Competition Bureau:

The Telecommunications Access Policy Division (Division) has under consideration the above-captioned Requests for Review of decisions issued by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company.<sup>1</sup> These requests seek review of SLD decisions pursuant to section 54.719(c) of the Commission's rules.<sup>2</sup>

The Commission's rules provide that the Wireline Competition Bureau (Bureau) must issue a decision resolving a request for review of matters properly before it within ninety (90) days unless the time period is extended.<sup>3</sup> The Bureau requires additional time to review the issues presented. Accordingly, we extend by an additional sixty (60) days

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<sup>1</sup> Letter from Dr. Robert Johnston, American Falls School District No. 1381, filed June 30, 2003; Letter from Robert Morrow, Approach Learning and Assessment Centers (filed by E-Rate Consulting), filed June 20, 2003; Letter from E. Ashton Johnston, Banning Unified School District, filed June 6, 2003; Letter from Chris Webber, CRW Consulting, LLC, filed June 13, 2003; Letter from E. Ashton Johnston, El Monte Unified High School District, et al, filed June 19, 2003; Letter from D. Scott Barash, Florence County School District 3, filed June 9, 2003; Letter from Fowler Elementary School District No 45, filed June 26, 2003; Letter from Jim Chapman, Grant Joint Union High School District, filed June 6, 2003; Letter from Barbara Ridgway, Helena Public School District, filed June 10, 2003; Letter from Bill Alexander, Humble Independent School District, filed June 18, 2003; Letter from Colleen Boothby, International Business Machines Corporation (filed on behalf of Winston-Salem/Forsyth County School District), filed June 20, 2003; Letter from Walter Steimel, Integrity Communications on behalf of San Diego Independent School District, filed June 12, 2003; Letter from Scott J. Oyer, Iroquois West Community Unit School District No. 10, filed June 19, 2003; Letter from William F. Berardi, John A. Coleman Catholic High School, filed June 4, 2003; Letter from Pat Dickens, Knox County School District, filed June 4, 2003; Letter from Lake City Area School District, filed June 19, 2003; Letter from Gerald W. Cobb, Lincoln Parish School Board, filed June 10, 2003; Letter from Bill Beverage, Nampa School District-131, filed June 5, 2003; Letter from Rabbi David Akhamizadeh, Ohr Haemet Ahavas Israel, filed June 23, 2003; Letter from Kurt A. Snodgrass, OneNet, filed June 13, 2003; Letter from Ron Milliner, Owensboro Public Schools, filed June 11, 2003; Letter from Nathaniel Hawthorne, Penn Cambria School District, filed June 4, 2003; Letter from Dr. Lila Wills Bronson, Rosemead School District, filed June 23, 2003; Letter from Jim Utley, School Board of Alachua County, filed June 24, 2003; Letter from Kemal Hawa, School District of Palm Beach County, filed June 16, 2003; Letter from Carol J. Swinney, Southwest Plains Regional Service Center, filed June 11, 2003; Letter from Marion Schiefer, Starkville School District, filed June 9, 2003; Letter from Sister Margaret Mary, Sts. Peter and Paul School, filed June 16, 2003; Letter from Robert Trover, Tamaroa Public School District No. 5, filed June 23, 2003; Letter from Noreen Michael, Virgin Islands Department of Education, filed June 17, 2003; Letter from Shlomo Levine, Yeshiva Bnos Ahavas Israel, filed July 9, 2003 (Requests for Review).

<sup>2</sup> See Requests for Review. Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c).

<sup>3</sup> 47 C.F.R. § 54.724(a).

the deadline by which the Bureau must take action regarding the instant Requests for Review of decisions by the SLD.

Accordingly, IT IS ORDERED, pursuant to section 54.724(a) of the Commission's rules, 47 C.F.R. § 54.724(a), that the time period for taking action in the above-captioned Requests for Review IS EXTENDED BY an additional sixty (60) days to November 25, 2003, for the Request for Review filed by American Falls School District No. 1381, American Falls, Idaho; to November 18, 2003, for the Request for Review filed by Approach Learning and Assessment Centers (filed by E-Rate Consulting), Woodstock, Georgia; to November 4, 2003, for the Request for Review filed by Banning Unified School District, Banning, California; to November 11, 2003, for the Request for Review filed by CRW Consulting, LLC, Tulsa, Oklahoma; to November 15, 2003, for the Request for Review filed by El Monte Unified High School District, et al, El Monte, California; to November 4, 2003, for the Request for Review filed by Florence County School District 3, Chicago, Illinois; to November 22, 2003, for the Request for Review filed by Fowler Elementary School District No 45, Arizona; to October 31, 2003, for the Request for Review filed by Grant Joint Union High School District, McClellan, California; to November 7, 2003, for the Request for Review filed by Helena Public School District, Helena, Montana; to November 15, 2003, for the Request for Review filed by Humble Independent School District, Humble, Texas; to November 18, 2003, for the Request for Review filed by International Business Machines Corporation (filed on behalf of Winston-Salem/Forsyth County School District), Winston-Salem, North Carolina; to November 8, 2003, for the Request for Review filed by Integrity Communications on behalf of San Diego Independent School District, San Diego, Texas; to November 15, 2003, for the Request for Review filed by Iroquois West Community Unit School District No. 10, Gilman, Illinois; to November 1, 2003, for the Request for Review filed by John A. Coleman Catholic High School, Hurley, New York; to November 1, 2003, for the Request for Review filed by Knox County School District, Knoxville, Tennessee; to November 15, 2003, for the Request for Review filed by Lake City Area School District, Michigan; to November 7, 2003, for the Request for Review filed by Lincoln Parish School Board, Ruston, Louisiana; to November 1, 2003, for the Request for Review filed by Nampa School District-131, Nampa, Idaho; to November 18, 2003, for the Request for Review filed by Ohr Haemet Institute, Los Angeles, California; to November 11, 2003; for the Request for Review filed by OneNet, Oklahoma City, Oklahoma; to November 8, 2003, for the Request for Review filed by Owensboro Public Schools, Owensboro, Kentucky; to November 1, 2003, for the Request for Review filed by Penn Cambria School District, Cleveland, Ohio; to November 18, 2003, for the Request for Review filed by Rosemead School District, Rosemead, California; to November 21, 2003, for the Request for Review filed by School Board of Alachua County, Gainesville, Florida; to November 11, 2003, for the Request for Review filed by School District of Palm Beach County, West Palm Beach, Florida; to November 8, 2003, for the Request for Review filed by Southwest Plains Regional Service Center, Sublette, Kansas; to November 4, 2003, for the Request for Review filed by Starkville School District, Starkville, Mississippi; to November 11, 2003, for the Request for Review filed by Sts. Peter and Paul School, Warren, Ohio; to November 18, 2003, for the Request for Review filed by Tamaroa Public School District No. 5, Tamaroa, Illinois; to November 14, 2003, for the Request for Review filed by Virgin Island Department of Education, St.

Thomas, Virgin Islands; to November 18, 2003, for the Request for Review filed by  
Yeshiva Bnos Ahavas Israel, Brooklyn, New York.

FEDERAL COMMUNICATIONS COMMISSION

Mark G. Seifert

Deputy Chief, Telecommunications Access  
Wireline Competition Bureau

Policy Division

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of

**Attachments 3**

Request for Review of the	)	
Decision of the	)	
Universal Service Administrator by	)	
	)	
Winston-Salem/Forsyth County School District	)	SLD No. 302305
Winston-Salem, North Carolina	)	
	)	
International Business Machines, Inc. on behalf of	)	SLD No. 302305
Winston-Salem/Forsyth County School District	)	
Winston-Salem, North Carolina	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	
Changes to the Board of Directors of the	)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.	)	

**ORDER****Adopted: December 4, 2003****Released: December 8, 2003**

By the Commission:

**I. INTRODUCTION**

1. Before the Commission are Requests for Review by Winston-Salem/Forsyth County School District, Winston-Salem, North Carolina (Winston-Salem), and International Business Machines, Inc. (IBM).<sup>1</sup> This school and IBM seek review of decisions of the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator) that denied Winston-Salem \$16.7 million in discounts for internal connections from the universal

<sup>1</sup> *Request for Review of the Decision of the Universal Service Administrator by Winston-Salem / Forsyth County School District*, CC Docket Nos. 96-45 and 97-21, Request for Review, filed June 20, 2003 (Winston-Salem Request for Review); *Request for Review of the Decision of the Universal Service Administrator by International Business Machines, Inc. on behalf of Winston-Salem / Forsyth County School District*, CC Docket Nos. 96-45 and 97-21, SLD No. 302305, Request for Review, filed June 20, 2003 (IBM Request for Review).

service support mechanisms for schools and libraries for Funding Year 2002.<sup>2</sup> For the reasons set forth below, we grant these Requests for Review, and remand to SLD for consideration in accordance with this Order.

2. Today the Commission also releases the *Ysleta* Order, which addresses requests for review by other applicants that also selected IBM as their service provider.<sup>3</sup> In the *Ysleta Order*, the Commission finds that a number of schools in Funding Year 2002 engaged in various practices that violated one or more of our rules regarding competitive bidding, the weighting of price in selecting among bidders, and the submission of bona fide requests for services under this support mechanism.<sup>4</sup> The Commission also concluded, however, that the circumstances of those applicants justified a waiver of our rules governing the Funding Year 2002 filing window, and allowed those applicants to re-bid for their requested services.<sup>5</sup> As set forth below, we conclude that the facts presented in this case, unlike the cases that the Commission addresses in the *Ysleta Order*, do not support a denial of Winston-Salem's request for discounts under the program.

## II. BACKGROUND

### A. Governing Rules

3. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts for eligible telecommunications services, Internet access, and internal connections.<sup>6</sup> Section 254(h)(1)(B) of the Act provides, "All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to [schools and libraries] for educational purposes at rates less than the amounts charged for similar services to other parties . . . ."<sup>7</sup> The Commission elaborated on the meaning of "bona fide" in the *Universal Service Order*, where it stated that Congress "intended to require accountability on the part of schools and libraries," which should therefore be required to "(1) conduct internal assessments of the components necessary to use effectively the discounted services they order; (2) submit a complete description

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<sup>2</sup> See Winston-Salem Request for Review. Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c).

<sup>3</sup> See in the *Matter of Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, et al.*, CC Docket Nos. 96-45 and 97-21, SLD Nos. 321479, 317242, 317016, 311465, 317452, 315364, 309005, 317363, 314879, 305340, 315578, 318522, 315768, 306050, 320461, FCC 03-313 (December 8, 2003) (*Ysleta Order*).

<sup>4</sup> *Ysleta Order* at paras. 20-63.

<sup>5</sup> *Ysleta Order* at paras. 64-78.

<sup>6</sup> 47 C.F.R. §§ 54.502, 54.503.

<sup>7</sup> 47 U.S.C. § 254(h)(1)(B) (emphasis added).

of services they seek so that it may be posted for competing providers to evaluate; and (3) certify to certain criteria under perjury.”<sup>8</sup>

4. In the *Universal Service Order*, the Commission designed the program application structure to encourage competitive bidding on specific eligible products and services. Our rules provide explicit requirements for applicants to develop technology plans based on the reasonable needs and resources of the applicant, setting forth in detail how the applicant will use certain technologies in the near term and into the future, and how they plan to integrate the use of the technologies into their curriculum.<sup>9</sup> At the time of the FCC Form 470 filing, applicants must certify whether their technology plans have been approved, and that they recognize that support is conditional upon securing access “to all of the resources, including computers, training, software, maintenance, and electrical connections necessary to use the services purchased effectively.”<sup>10</sup> This requirement limits waste in the program by ensuring that products and services for which discounts are sought have been carefully selected to complement an applicant’s educational and information goals, consistent with available resources. The Commission specifically required that technology plans be independently approved, to ensure that the plans are based on the “reasonable needs . . . of the applicants and are consistent with the goals of the program.”<sup>11</sup>

5. The Commission’s rules state that “an eligible school or library shall seek competitive bids . . . for all services eligible for support . . . .”<sup>12</sup> Under our rules, the competitive bidding process involves the use of an FCC Form 470 describing services being sought. An eligible school, library, or consortium seeking to receive discounts for eligible services must submit to the Administrator a complete FCC Form 470, which must include certain information such as information about the computer equipment, software, and internal connections available or budgeted for purchase, and staff experience.<sup>13</sup> As explained in the *Universal Service Order*, the Form 470 must “describe the services that the schools and libraries seek to purchase in sufficient detail to enable potential providers to formulate bids. . . .”<sup>14</sup> Each applicant must certify in its

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<sup>8</sup> *Universal Service Order*, 12 FCC Rcd at 9076, para. 570.

<sup>9</sup> See *Universal Service Order*, at 9077, para. 572-74.

<sup>10</sup> *Id.* In a recent Further Notice of Proposed Rulemaking, the Commission sought comment on whether to change our rules so that applicants may certify that their technology plans will be approved by the time that E-rate supported services begin. See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Rulemaking, FCC 03-101 at paras 99-100 (*rel. April 30, 2003*) (*Second Order and FNPRM*).

<sup>11</sup> *Universal Service Order*, 12 FCC Rcd at 9077, paras. 573-74.

<sup>12</sup> 47 C.F.R. § 54.504(a).

<sup>13</sup> 47 C.F.R. § 54.504(b).

<sup>14</sup> *Universal Service Order*, 12 FCC Rcd at 9078, para. 575 (emphasis added).

FCC Form 470 that it has developed a technology plan that has been approved by an authorized entity.<sup>15</sup>

6. The Administrator must post each applicant's Form 470 on SLD's website, allowing review by all potential competing service providers.<sup>16</sup> After waiting at least four weeks so that competing providers may consider submitting competitive bids for services, the eligible school, library, or consortium seeking discounts may then enter into a contract with the chosen service provider. The applicant then submits a completed FCC Form 471 application to the Administrator, indicating the selected service provider and services for which discounts are sought.<sup>17</sup> SLD reviews the FCC Forms 471 that it receives and issues funding commitment decisions in accordance with the Commission's rules. Applications that are received outside of this filing window are subject to separate funding priorities under the Commission's rules, and typically do not receive funding.<sup>18</sup>

7. Under our rules, applicants must select the most cost-effective bids.<sup>19</sup> The Commission's rules state, "These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements."<sup>20</sup>

### **B. Winston-Salem's Application**

8. Winston-Salem's Funding Year 2002 FCC Form 470 was posted on SLD's website on November 15, 2001.<sup>21</sup> Winston-Salem indicated in its FCC Form 470 that it was seeking

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<sup>15</sup> 47 U.S.C. § 54.504(b)(2)(vii). An applicant must certify that its technology plan has been "certified by its state, the Administrator, or an independent entity approved by the Commission." *Id.* Technology plans must establish the connections between the information technology and the professional development strategies, curriculum initiatives, and objectives that will lead to improved education or library services. They must (1) establish clear goals and a realistic strategy for using telecommunications and information technology to improve education or library services; (2) include a professional development strategy to ensure adequate use of the technology; (3) include an assessment of the telecommunications services, hardware, software, or other services needed; (4) provide for a sufficient budget; and (5) include an evaluation process to monitor progress and make mid-course corrections. *See Universal Service Order*, 12 FCC Rcd at 9077-78, paras. 572-74; SLD web site, Frequently Asked Questions About Technology Planning, <<http://www.sl.universalservice.org/reference/TechnologyPlanningFAQ.asp>>.

<sup>16</sup> 47 C.F.R. § 54.504(b); *Universal Service Order*, 12 FCC Rcd at 9078, para. 575.

<sup>17</sup> 47 C.F.R. § 54.504(b), (c); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (FCC Form 471). The FCC Form 471 notifies SLD of the services that have been ordered and indicates the amount of discounts sought. *Id.*

<sup>18</sup> 47 C.F.R. § 54.507(g).

<sup>19</sup> *Universal Service Order*, 12 FCC Rcd at 9029-30, para. 481.

<sup>20</sup> 47 C.F.R. § 54.504(a).

<sup>21</sup> *See* Winston-Salem FCC Form 470.

services for virtually every product and service eligible for discounts under the support mechanism.<sup>22</sup> In Blocks 8, 9, and 10 of FCC Form 470, Winston-Salem checked the box for, respectively, telecommunications services, Internet access, and internal connections, indicating in each instance "No, I do not have an RFP [Request for Proposal] for these services."<sup>23</sup> Winston-Salem also states that it received a number of telephone inquiries in response to the FCC Form 470, and that those companies that inquired were given "information necessary to complete a proposal."<sup>24</sup> Winston-Salem also states that BellSouth was interested in selling Cisco equipment to Winston-Salem, but that once BellSouth understood the broad nature of Winston-Salem's request for internal connections, BellSouth decided not to submit a proposal.<sup>25</sup> Unlike in Ysleta's case, only one vendor, IBM, submitted a proposal in response to Winston-Salem's FCC Form 470.<sup>26</sup>

9. In its proposals, IBM sought to provide a variety of services, at one total price, for system design and installation of these technologies for Winston-Salem. Winston-Salem stated in correspondence with SLD, "[S]ince there were not other bids, the selection process was very straightforward. We evaluated the one and only bid for each of the requested services."<sup>27</sup> IBM negotiated various SOWs, and submitted the completed SOWs on January 17, 2002, the last day of the filing window.<sup>28</sup> Winston-Salem selected IBM as its service provider and filed its FCC Form 471 on January 17, 2003.<sup>29</sup>

10. More than five months after filing its FCC Form 471, on June 25, 2002, Winston-Salem released an RFP seeking an additional System Integrator (a "Strategic Technology Integration Partner") to implement its technology plan.<sup>30</sup> In contrast to Ysleta, Winston-Salem's RFP excluded work related to E-rate services since IBM was already selected to perform such

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<sup>22</sup> See Winston-Salem FCC Form 470.

<sup>23</sup> See Winston-Salem FCC Form 470.

<sup>24</sup> Winston-Salem Request for Review at 12.

<sup>25</sup> *Id.*

<sup>26</sup> See Winston-Salem Request for Review at 12.

<sup>27</sup> See Winston-Salem Response to SLD Item 25 Selective Review.

<sup>28</sup> See generally Winston-Salem FCC Form 471 and attachments; IBM Global Services Proposal for Winston-Salem/Forsyth County Schools to Provide Cable and Networking Electronics, dated January 17, 2002; IBM Global Services Proposal for Winston-Salem/Forsyth County Schools to Provide Wireless LAN, dated January 17, 2002; IBM Global Services Proposal for Winston-Salem/Forsyth County Schools to Provide Voice Over IP, dated January 17, 2002. The record reflects negotiations between IBM and Winston-Salem that resulted in the completed SOWs. See Winston-Salem Response to SLD Item 25 Review (appointment calendar showing numerous conference calls and meetings with IBM).

<sup>29</sup> See Winston-Salem FCC Form 471; Winston-Salem Request for Review at 11-12.

<sup>30</sup> See Winston-Salem Request for Proposal. Winston/Salem's RFP was revised on December 5, 2002. See *id.*

work.<sup>31</sup> After receiving seven proposals in response to its RFP, Winston-Salem selected Eperitus, LLC to be its System Integrator.<sup>32</sup>

11. On April 21, 2003, SLD denied discounts for Winston-Salem finding the “[a]pplicant did not identify the specific services sought - either clearly on the 470 or in an RFP - to encourage full competition on major new initiatives.”<sup>33</sup>

### III. DISCUSSION

12. We conclude, based on the record before us, that SLD erred in denying the discounts requested by Winston-Salem. The grounds upon which we found rule violations in the *Ysleta* case are not present here.

13. First, we cannot conclude that Winston-Salem violated our competitive bidding rules. Unlike the *Ysleta Order*, Winston-Salem did not issue any sort of RFP for a systems integrator prior to filing its FCC Form 471. It merely posted a request for bids for eligible services on FCC Form 470. While we are troubled that it utilized an overly broad FCC Form 470, that is not, in itself, a basis for denying its requests for discounts. In the *Ysleta Order*, we clarified that the requirement for a bona fide request for services means that applicants must submit a list of specified services for which they anticipate they are likely to seek discounts, consistent with their technology plans; they may not list every service and product eligible for discounts under the schools and libraries support mechanism. At the same time, we recognized that past practices arguably could be construed as permitting broad FCC Form 470, and therefore clarified this requirement prospectively.

14. Second, we cannot conclude that Winston-Salem failed to properly consider price when selecting its service provider because only one party responded to its posted FCC Form 470. Its decision to enter into a contract with the one bidder is no different than the thousands of other applicants who receive either no bids, or only one bid, in response to a FCC Form 470 posting. Our rules require applicants to seek competitive bids; they do not require an applicant to have competing bidders where none appear. While we find it unusual, given the size of Winston-Salem’s proposed project, that no other entity submitted a bid, this alone, without more, cannot be the basis for denying Winston-Salem’s request for review. We note, however, that this case demonstrates how an overly broad FCC Form 470 posting may well stifle competition among service providers. In the *Ysleta Order*, we clarify that prospectively such a broad FCC Form 470 is not consistent with our rules.<sup>34</sup>

15. Finally, we note that in its Request for Review, Winston-Salem describes in detail the process it employed to select a Systems Integrator, to demonstrate that Winston-Salem is

<sup>31</sup> See Winston-Salem Request for Proposal at §§ 2.6, 2.7.

<sup>32</sup> See Winston-Salem Request for Review at 5-6.

<sup>33</sup> See SLD Funding Commitment Decision Letter for Winston-Salem at 7-10.

<sup>34</sup> See *Ysleta Order* at paras. 36-37.

committed to utilizing a fully competitive selection process for the award of its contracts.<sup>35</sup> We find that Winston-Salem's procedures for selecting Eperitus as a Systems Integrator are not relevant to our decision here, because it did not seek discounts on any services provided by Eperitus, and the services provided by Eperitus were outside the scope of the E-rate program.<sup>36</sup>

16. For the reasons cited above, therefore, we grant the above-captioned Requests for Review and remand the Winston-Salem application to SLD. In doing so, we emphasize that we make no determination as to whether the applicant is ultimately entitled to any funding, as SLD must scrutinize all applications for ineligible services and compliance with all program rules, including all prospective clarifications enunciated in the *Ysleta Order*.

#### IV. ORDERING CLAUSE

17. ACCORDINGLY, IT IS ORDERED, pursuant to section 54.722(a) of the Commission's rules, 47 C.F.R. § 54.722(a), that the above-captioned Requests for Review ARE GRANTED to the extent provided herein and REMANDED to SLD for further processing in accordance with this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>35</sup> See Winston-Salem Request for Review at 4-6.

<sup>36</sup> We note, however, that Winston-Salem's 76-page RFP for Systems Integration sought bids based on specific pricing information related to management, design, construction costs, and quantity discounts. See Winston-Salem RFP. Winston-Salem's RFP, in contrast to Ysleta's, provides an example of how price can be taken into account in the competitive bidding process, rather than relying on mere negotiation to secure the most cost-effective services.

